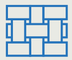
EMPLOYMENTCROSSING | LAWCROSSING
The most jobs— anywhere

Feature

Jury Trial Waivers, Are They ''Knowing, Voluntary, or Intelligent''?

By Nancy Hatch Woodward

Several weeks ago, we covered jury trial waivers (see '’Employee Dispute Resolution Programs - Jury Trial Waivers Instead of Arbitration Clauses''). That article looked at the employer's side of the argument. This week, we return to the topic, but from the plaintiff's point of view.

Employment law attorneys for employers have started suggesting their clients initiate jury trial waivers as an alternative to mandatory arbitration in their employee dispute resolution programs. They cite the fact that arbitration has grown more expensive, with courts asking employers to cover most of the expenses attributed to arbitration, and the fact that if they lose, they virtually have no recourse for getting the award overturned. Plaintiffs' attorneys are often in agreement that mandatory arbitration has not been in the best interests of their clients either, but they do not necessarily agree that a jury trial waiver is a better alternative.

"Mandatory arbitration is a scandal," asserts Cliff Palefsky, a partner in San Francisco office of McGuinn, Hillsman & Palefsky. "It subverts the nation's civil rights and labor laws and has had a detrimental effect on employees' rights." In particular, he notes several of the same concerns with the process that employers' lawyers do. In addition to being expensive and offering no right to appeal, there is limited discovery, which handicaps the participants, and arbitrators are not required to know or follow the law. But Palefsky, who is also the co-founder of National Employment Lawyers' Association (NELA) goes on to identify several other disturbing points in light of employees' rights. Arbitration occurs in private so that the public and media are not made aware of gross acts of discrimination, whistle-blower offenses, and other public policy matters; and arbitrators are reluctant to accuse companies of discrimination or to render rulings against people who are repeat customers.

Waivers instead of arbitration

But are waivers any better? Not at all, says Palefsky. "Forcing employees to sign these waivers is basically saying to them that they must waive their fundamental constitutional rights in order to get or retain their jobs. American citizens should not be put in that position. It is overreaching. Employers are using them to design a forum that is more favorable for them, which is the nature of the adversarial process. But the reason we have a Constitution and a court system is to protect the less powerful against those who can simply say 'take it or leave it.'"

Jean Sternlight—Saltman Professor of Law at the Boyd School of Law, University of Nevada, Las Vegas—says that case law has made it clear that people can waive their right to a jury trial only if that waiver is "knowing, voluntary, and intelligent," which advances a whole series of factors. Because waivers in the employment context have only recently been pursued, there is not much case law in that field. Palefsky notes there have only been a couple of cases where the courts have agreed with the use of waivers, but there have been no major authoritative decisions or meaningful constitutional analyses of these waivers; so it is too early to tell what will happen in terms of their use in employment contracts. However, there has been a substantial number of cases about waivers in other areas.

Most of the cases have been in the business context, such as franchisees or someone taking out a business loan who is asked to sign such a waiver; but even then, says Sternlight, the courts look at a whole series of factors to determine if the waiver was "knowing, voluntary, and intelligent." That analysis includes the language in which the waiver was conveyed to the person, whether or not it was clearly stated, the font size in which the document was written, and if there was an opportunity to negotiate that clause or it was forced on the person.

"I would think that the courts would use the same kind of analysis in the employment context," she observes. "An employee who was making minimum wage and was handed a stack of papers with the waiver somewhere in there to sign would more likely have the waiver struck down. On the other hand, if a high-level, well-paid, well-educated person was

 continued on back

taking a job as president of the company and negotiated a contract that waived his or her jury trial rights, there would be a greater likelihood that the waiver would be upheld by a court."

What can employees to do?

It's rare to find an employee who has the luxury of turning down a job over a matter of principle of this sort. But for employees who do want to challenge waivers, Palefsky suggests that they may find some relief from the EEOC. Title VII and the ADA both contain the right to trial by jury, he explains. All the civil rights statutes at this point permit trial by jury, so being forced to waive that could be a deprivation of statutory rights and may violate the nation's civil rights law. "Anyone impacted by having to sign a jury trial waiver should file a charge with the EEOC, alleging they are being coerced into surrendering their statutory rights," he says. "I would file that instantly."

Most attorneys are waiting to see what the courts will say. There is no trend yet because it is such a new concept. Courts were happy to approve mandatory arbitration because it cleared their dockets, says Palefsky, but that is not the case with jury trial waivers. It does not take the case off the court docket; in fact, it actually adds to the workload because they do not have a jury making the factual findings.

Some states, however, are already grappling with the topic. For example, the case *Grafton Partners, LP v. Superior Court* was argued in front of the California Supreme Court to determine whether these waivers will be enforceable. The California legislature is also getting into the act, says Palefsky, and is poised to write a bill dealing with the situation as soon as the court's decision comes down.

EmploymentCrossing is the largest collection of active jobs in the world.

We continuously monitor the hiring needs of more than 250,000 employers, including virtually every corporation and organization in the United States. We do not charge employers to post their jobs and we aggressively contact and investigate thousands of employers each day to learn of new positions. No one works harder than EmploymentCrossing.

Let EmploymentCrossing go to work for you.